Supreme Court, U.S.
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No. _____

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Dorothy Thomas,

Petitioner,

v.

Monsanto Employees' Credit Union,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's due process right were violated by the trial court, nor setting forth its logic in findings of facts and conclusions of law pursuant to F.R. Civ P. 52(a)?

2. Whether the United States Court of Appeals for the Eleventh Circuit has sanctioned the District Court's departure from accepted and usual Title VII analysis as set forth by this Court?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

DOROTHY THOMAS,	*	
	*	
Petitioner,	*	No. _____
	*	
v.	*	
	*	
MONSANTO EMPLOYEES' CREDIT UNION,	*	
	*	
	*	
Respondent.	*	

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Dorothy Thomas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

A bench trial was held in the United States District Court for the Northern District of Florida on April 5, 1993, through April 7,

1993. The District Court entered judgment in favor of Respondent-Employer on April 7, 1993. Petitioner filed her Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on May 7, 1993. Oral arguments were held on March 8, 1994, and the Eleventh Circuit, pursuant to Eleventh Circuit Rule 36-1, affirmed the judgment of the District Court, without an opinion on May 31, 1994. Petitioner filed a timely Petition for Rehearing and a Suggestion of Rehearing *En Banc*. On August 30, 1994, the Eleventh Circuit denied the foregoing petition, and Petitioner files this instant Petition for Writ of Certiorari.

JURISDICTION

The original jurisdiction of the United States District Court was conferred pursuant to 42 U.S.C. §2000e-5(f). The Petition for Rehearing and Suggestion *En Banc* was denied by the Eleventh Circuit on August 30, 1994, and judgment was entered on that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e-et. seq.).

2000e-2. Unlawful employment practices.

(a) Employer practices. It shall be an unlawful employment practice for an employer-

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, religion, sex, or national origin.

2000e-3. Other unlawful employment practices

> **(a) Discrimination for making charges, testifying, assisting or participating in enforcement proceedings.** It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor - management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership because he opposed any practices made an unlawful

> employment practice by this title [42 USC §§2000e-20002-17], or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title [42 USC §§2000e-2000e-17].

STATEMENT OF THE CASE

Introduction

This is a Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. This is a "Title VII" race and retaliation discharge claim.

How The Issues Were Raised Below

The issues in the Questions Presented were raised on the direct appeal to the United States Court of Appeals for the Eleventh Circuit. The Title VII violations were raised in the two courts below.

Factual Background

Petitioner had been employed with the Monsanto Employees' Credit Union since 1978 (R2-20). Plaintiff began her career as an entry level clerk, and was eventually promoted to senior loan clerk (R2-21). Petitioner was the only African-American loan officer employed with the Credit Union up until her demotion (R2-21).

In, or around, July 1987, the Credit Union observed some problems with loans made to members financing vehicles through a dealer, Auto's by Dave (R2-192). It was discovered that Petitioner had made several of the foregoing loans. Petitioner was thereupon demoted to an entry level clerk, and reassigned out of the loan processing area all together. No one involved with Auto's by Dave's transactions, except for Petitioner, was demoted, and/or, disciplined in any other manner, at this time. No other loan officer in the history of the Credit Union had been dismissed for loan delinquencies or repossessions (R2-77, 104).

Petitioner, believing that the Credit Union had singled her out for discrimination in her demotion, addressed the Board of the Credit Union, and made her feelings known about the perceived discrimination (R2-45). Petitioner was immediately thereafter suspended for two weeks with pay, and, upon her return, she was discharged (R2-48).

Petitioner, thereupon aggrieved her discriminatory demotion and her retaliatory discharge in the Equal Employment Opportunity

Commission (hereinafter, EEOC). After receiving a final determination from the EEOC, she filed a civil action in the United States District Court for the Northern District of Florida on September 3, 1991 (R1-25-3). After a two-day bench trial, the District Court, without findings of fact and conclusions of law, as required pursuant to F.R.Civ.P. 52(a), issued a bench decision entering judgment for the Respondent.

Petitioner timely appealed the District Court's decision to the United States Court of Appeals for the Eleventh Circuit. After hearing oral arguments in March 1994, the Eleventh Circuit, pursuant to Eleventh Circuit Rule 36-1, affirmed the District Court without an opinion. Petitioner, still without the logic of either the District Court or the Eleventh Circuit's panel, filed a Petition for Rehearing and a Suggestion of Rehearing *En Banc*. The Eleventh Circuit, in a per curiam decision, denied her Petition for Rehearing and Suggestion of Rehearing *En Banc*.

Petitioner, after litigating her case in three different court proceedings, and without the basic right of due process- the right to

have the court set forth its logic in deciding against her - files this instant Petition for Writ of Certiorari.

Considerations For Granting The Writ Applicable to Questions Presented

As Title VII approached its thirtieth birthday on July 2, 1994, Title VII litigation since 1971 has increased approximately 400 percent. Title VII litigants are, no doubt, "clogging up" the dockets in United States District Courts throughout the nation. Title VII, which once was a popular statute for the people in the 1970's, has now become an endless nightmare for District Courts[1].

For most part, Title VII litigants are not as affluent as the average civil litigant in District Court. Title VII litigants are generally plaintiffs who are forced into litigation. They are litigants, unlike defendant-employers, who can ill afford either the emotional

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[1]Petitioner's counsel opposed a Rule 35 medical examination of one of her plaintiffs in the case of *Virginia B. Stith v. Lloyd Bentson, Sec. Dept. of Treasury*, File No. 93-CV- 1028-FMH (ND Ga) because she feared it could have a chilling effect on Title VII litigation. The U.S. Magistrate Judge, to whom the case has been referred, replied in an exasperated manner, "Ms. Munson there will never be a shortage of Title VII discharge cases".

trauma or financial aspects of a lawsuit. More important, Title VII litigants, as evident by the nature of the litigation, are disadvantaged people belonging to one or more protected classes in society.

In short, Title VII litigants are generally different than other civil litigants, and due to the increase of Title VII cases, there appears to be a trend towards the District Courts summarily dismissing Title VII cases, and not giving this class of litigants "their day in court".

The case *sub judice* is a headline example of the mistreatment that Title VII litigants can receive in the judicial system.

There is a need for this court to grant certiorari in this case to send a message to defendant-employers that even though they have the financial resources and can generally "out wait" the Title VII plaintiffs, in the course of the judicial proceedings, that these litigants will not be abused during litigation, and the message to Title VII plaintiffs' practitioners that there will be a chance of a fair trial to recover the fruits of their labor.

The United States Congress might as well repeal the Title

VII, if plaintiffs are not able to make lucrative arrangements with counsel to represent them at the trial stage.[1]

1.

Petitioner's due process rights were violated by the trial court not setting forth its logic in findings of facts and conclusions of law pursuant to F.R.Civ.P. 52(a).

In every civil case, tried without a jury, or with an advisory jury, the court shall find the facts especially and state separately its conclusions of law thereon (*See* F.R. Civ.P. 52(a)). Title VII cases, as this court has declared, are nothing more than credibility contests (*See Cooper v Federal Reserve Bank*, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984)). Indeed, Title VII cases do, and often, come down to nothing more than which party is more believable. However, the Fifth Circuit has addressed this issue in the case, *Redditt v Mississippi Extended Care Centers*, 718 F.2d 138 (5th Cir

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[1] When "Title VII" was in its heyday, attorneys accepted Title VII cases strictly on a contingency fee basis. Now the average retainer that a Title VII plaintiff can expect to pay in the Eleventh Circuit is from $3,000.00 - $6,000.00, depending on the strength of the case.

1983), when it held that the trial court must do more than issue conclusory findings on the issue of pretext. More, in particular, the Fifth Circuit has held where there is clearly a choice between conflicting testimony, that F.R.Civ.P 52(a) requires the trial court to make findings of fact on each subsidiary issue which leads to the ultimate findings of the court.

The Fourth Circuit held the same as the Fifth. In the case of *Murrell v. Trailways Southern Lines, Inc.,*[1] 39 FR Serv 2d 124 (4th Cir. 1984), the court found that the trial judge's colloquy with counsel, during the trial, that plaintiff made a *prima facie* case and that defendant had advanced evidence to rebut the presumption of intentional discrimination was insufficient as a matter of law to meet the intent of F.R.Civ.P. 52(a). Both of the foregoing cases are direct on point with the case *sub judice.*

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[1] In this case, the trial judge recognized that these types of findings were inadequate as evidenced by his message that if the plaintiff intended to appeal, then he would review the transcript and write more detailed findings. The judge died before the appeal.

In the case at bar, the District Court's findings as to Petitioner's retaliation claim is a travesty to justice. The Court held as follows:

> "The question then become whether the reasons were in fact, pretextual and I find that the reason for the demotion is obvious from the record, I don't think there is any question whatsoever about that and that leaves only the termination. And there, too I do find sufficient basis for the termination by the Board" [*See* transcript R2-560, Appendix A. pp.5a-6a].

Clearly, due process requires that the District Court answer Petitioner. She is entitled to understand the logic of the District Court and the basis for its decision. Although a lack of findings, per se, do not, preclude appellate review, however, the reviewing court must be able to ascertain from the record the basis of the District Court's decision. The appellate court may not review the record and weigh the weight of the evidence and substitute its judgment for that of the District Court (*See Rothenberg v. Security Management Co.*, 736 F.2d 1470 1472-73 (11th Cir. 1984)).

Such a course of action, as the District Court's lack of findings and the reviewing court presumably weighing the weight of

the evidence, thus creating the missing subsidiary findings, clearly violated Petitioner's right to have a fair trial.

2.

The United States Court of Appeals for the Eleventh Circuit has sanctioned the District Court's departure from accepted and usual Title VII analysis as set forth by this Court.

In the twenty-one years since this Court's landmark decision in the case of *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), Title VII cases are tried throughout the nation in all forums from administrative to judicial, utilizing the framework for presenting evidence as set forth in *McDonnell-Douglas*. Each of the prongs of the four part methodology of *McDonnell-Douglas*, requires the District Court to make a subsidiary finding.

In the case at bar, the District Court, although there is much confusion on this issue[1], as evidenced by its findings disputes

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[1] The District Court finds that Petitioner's statistical data (loans and ratios and foreclosures, or mortgage lien terminations and losses) does not compare to the white loan officer. [*See* Transcript, Appendix A, p. a. 4a]. However, the reason that Respondent advanced at trial was not this reason. The Credit Union Manager, Doyle

whether Petitioner has made a *prima facie* case. The District Court finds that Petitioner was not similarly situated to a white loan officer, who had a high rate of delinquency, based on the "so-called" statistical data [*See* Transcript, Appendix A, page a.4].

Under *McDonnell-Douglas*, any white loan officer who had any type of delinquent loan balances or high rates of repossessions would be similarly situated to the Petitioner. The employer may, of course, present a business reason why the white employee was not subjected to the adverse personnel action that the protected class person was subjected to.

However, the District Court can not advance some theory that was not raised during the course of trial. In doing so, it has circumvented this Court's decision in *McDonnell-Douglas*, and deviated from the acceptable methodology for deciding Title VII claims (i.e. Petitioner never got the opportunity to rebut the District

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Griffiths, the then second line manager of the Petitioner, testifies at trial that Petitioner was demoted, not for her loan delinquencies, etc. (statics) but for her poor workmanship [*See* Transcript, R2-214].

Court's business reason as to why the personnel action had been taken against her).

Moreover, had the Respondent articulated such a reason at trial, Petitioner would have objected based on the *after-acquired evidence* doctrine. The data, for which, the District Court relied on, in part, was generated for periods of time after the Petitioner had not only been demoted, but terminated. Recently this Court heard oral arguments in the case of *McKennon v. Nashville Banner Publishing Co.*, Sup.Ct. No. 93-1543, *cert granted,* May 23, 1994, concerning this issue.

Clearly, terminating a protected class person, and then "rummaging" through her background" to justify disparate treatment is precluded by Title VII caselaw, inasmuch as, it undermines the purpose of the Act, and the interest of the public at large - to eradicate illegal discrimination in the work place.

The District Court's analysis of Petitioner's retaliation claim circumvents valid, established precedent, not only in the Eleventh Circuit, but in every other circuit as well. In the case at bar, the

District Court finds that Petitioner can make no *prima facie* case of retaliation because she can not point to any white person who had been treated differently than she [Transcript, Appendix A, p. a.6].

Clearly, in a retaliation claim [1], adverse action on the heels of protected activity (i.e. timing) is sufficient to establish the causal connection (the third prong) (*See Hairston, id.* at 920; *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1524, (11th Cir. 1991); and *Donnellon v. Fruehauf Corp.*, 794 F.2d 598 (11th Cir. 1986)). In the case at bar, the District Court's analysis falls far short of recognized authorities in the Eleventh Circuit. Such a departure is troubling to say the least.

Moreover, assuming that the District Court correctly found that Petitioner made a *prima facie* case, the Respondent's reasons

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[1] To establish a *prima facie* case of retaliation, the plaintiff must show the following: (1) that she engaged in protected activity; (2) that an adverse action was taken; and (3) there is a causal connection between the adverse action and the protected activity(i.e. that the two were not wholly unrelated) (*See Hairston v. Gainsville Sun Pub. Co.*, 9 F.3d 913, 920 (11th Cir. 1993)).

advanced at trial as to the reason why Petitioner was terminated were insufficient as a matter of law to meet its light burden of production. The articulated reasons given by the Credit Union Manager, who was in the Petitioner's managerial chain, that she was unhappy after she had been transferred and that she cried a lot, were insufficient as a matter of law, inasmuch as, it left nothing for Petitioner to rebut (*See I.M.P.A.C.T. v. Firestone*, 893 F.2d 1189, 1193 (11th Cir. 1990)).

CONCLUSION

Clearly, the Eleventh Circuit's sanctioning the District Court's departure from acceptable Title VII analysis, which was developed by this Court in *McDonnell-Douglas*, must not go unreviewed. Title VII cases, are perhaps a district judge's worse nightmare, in terms of clearing his/her docket; however, given the purpose and the humanitarian value of the statute, this Court should not allow Title VII trials to be reduced to an abbreviated fashion for the sole purpose of expediency at the risk of harm to the plaintiffs.

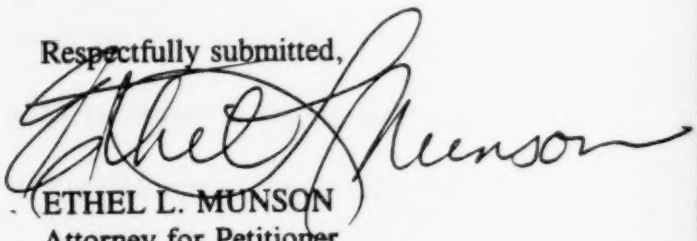
Title VII cases, even though the plaintiffs are members of racial minorities, women, or members of other disadvantaged

protected groups in society, stand on equal footing with all other civil litigation in District Courts and in the Courts of Appeals.

Title VII cases must be tried in the same manner as all other civil litigation, and the District Court should not be permitted to depart from clearly established procedures (i.e. making findings of fact and conclusions of law pursuant to F.R.Civ.P. 52 (a)). Nor should this District Court, in the case at bar, be permitted to circumvent valid precedent of this Court.

The Court should grant Petitioner's writ of Certiorari for all of the reasons and arguments presented herein.

Respectfully submitted,



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THE COURT: All right. Let me attempt to give you the verdict in this matter.

I think there's no doubt about the sincerity of the plaintiff, Miss Thomas. I think there is little doubt that she believes she was treated unfairly, discriminated against, but I do have to take note that the evidence establishes that she has made a significant number and amount of bad loans as a loan officer, and the credit union clearly had the right to question and figure out and determine why, which they undertook to do.

I think the evidence supports that they found arguably incorrect debt ratios, at least from the files, unverified income, and no accounting for insurance, which is obvious in any mortgage or lien for automobile; questionable use of child support, particularly without verification -- I don't attempt to list them all, but just to point to some of them -- the two-check question, certainly is questionable when it comes to making a check out for a commission, and in the number and amount of loans that took place; the questionable memberships, I don't know that the same day you get the loan is too

significant, but I think clearly when you look at the number of alleged relatives that one person has that she deals with should have caused her some concern with the issue. All of these things taken in combination cause question as to her abilities, particularly when they all come together in light of her relationship with Autos by Dave, and in particular Buck Lee.

I'm not sure that the question is whether she acted in good faith or not, she may have just been sloppy or may have been just careless, but clearly the record demonstrates incompetence in her role as a loan officer, particularly where it is that she came in contact with Buck Lee. She may well have been scammed, too.

MR. ALLBRITTON: Your Honor, I hate to interrupt you, but for the record's sake, I think you should say Buck English. Buck Lee is the county commissioner, and he may not appreciate that.

THE COURT: I appreciate that.

That she may have been scammed, too, by one smooth operator, as apparently a lot of people were in this case.

But whether she was part and parcel of that, he certainly took

advantage of her sloppiness, and perhaps I'm more inclined to believe her trusting nature.

But as far as the law of this particular case goes, I do find at the very beginning that there has been no direct evidence of discrimination in this case. Accordingly, the plaintiff has the burden of proving disparate treatment through circumstantial evidence; and, as Mr. Allbritton correctly noted, that's a very difficult burden. But in order to prove her discriminatory demotion claim, the plaintiff had to prove the following elements:

That she was a member of the protected group, which she certainly has done; that she was adverse -- that there was an adverse employment action that was taken against her, and clearly, with the demotion and the termination, that has been proven; and, thirdly, she must prove that she was treated more harshly than persons not in the protected group under similar circumstances.

In order to prove her retaliation claim, the plaintiff had the burden of proof that she engaged in activity protected under Title 7, and clearly she has done that with her claim and protest of

discrimination; and that an adverse employment action was taken against her, and certainly that was, in fact, done; and, thirdly, which is the important one, that there was some causal link between the activity and the adverse employment action.

I do find that, as to the third part of the discriminatory demotion claim, that she has failed to satisfy the third prong -- that she was treated more harshly than persons not in the protected group under similar circumstances.

I know that you emphasize on behalf of the claimant Sue Culver, and I have looked carefully at all the data and all the charts that have been prepared, and definitely cannot see the same relationship there, that her loans and ratios and foreclosures, or mortgage lien terminations and losses simply do not compare to this [plaintiff].

And while you suggest I could not look at Sammie Singleton because perhaps of the same claim, I find that you can look at the statistics, and see that Sammie Singleton stands out over and above any other employee at the credit union, including Miss Thomas,

in terms of foreclosures and losses and such. So, I do see them distinctly in different categories than the other people in the credit union, both black or white, because I related Sammie Singleton to Miss Thomas in making that statement.

Then, as to the causal link between the activity and the adverse employment action, I do find that the credit union through the management and the board acted in good faith. You certainly point out some instances where the information and particular items and areas might have been interpreted differently, or might in fact have been an error but that does not distort the fact that they acted in good faith in relying on that data that they had before them, and made reasonable interpretations on their own, right or wrong, but that they acted in good faith.

Clearly, the demotion was proper in that this plaintiff was, in fact, failing to meet her responsibilities as a loan officer, and the board would have abrogated their responsibility, their fiscal responsibility to the members of the credit union by failing to take action in allowing her to continue in this same fashion.

The question then becomes whether the reasons were, in fact, pretextual. And I do find, though, that the reason for the demotion is obvious from the record, I don't think there is any question whatsoever about that, and that leaves only the question of termination.

And there, too, I do find sufficient basis for the termination by the board.

The ruling would remain the same, even if the plaintiff had proven her prima facie case, because the defendant did, in fact, articulate legitimate, nondiscriminatory reasons for the demotion and the termination, and the plaintiff has failed to met her burden in establishing that these reasons constituted pretext for discrimination, because I find from the facts and the statistics that have been presented that they were not pretextural but that they did, in fact, exist.

Under the law of the Circuit, therefore, you need only produce credible evidence to support these legitimate reasons, and does not carry the burden of persuasion. That burden remains with

the plaintiff to show that her participation in the protected activity was a significant factor in Monsanto's decision to terminate her, and I do find that she has failed to meet that burden. In fact, she has not proved to the court's satisfaction that race played any role in the defendant's actions in this particular case.

So, for those reasons, and the law as the Court finds them, the Court finds that the plaintiff should take nothing by this action, and defendants should go hence without day and recover their costs, which will be taxed by the clerk.

Any other findings or points that you feel the Court should make? Mr. Coil?

MR. COIL: No, Your Honor. I thank the Court for its time and attention in hearing this matter.

THE COURT: Any by the plaintiff?

MR. ALLBRITTON: None, Your Honor. Thank you.

THE COURT: Court will be adjourned.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 93-2562 and 93-3389

D.C. Docket No. 91-30309-LC

DOROTHY THOMAS,

Plaintiff-Appellant,

versus

MONSANTO EMPLOYEE'S CREDIT UNION, MECU,

Defendant-Appellee.

Appeals from the United States District Court
For the Northern District of Florida

(May 31, 1994)

Before HATCHETT and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

Affirmed. See Eleventh Circuit Rule 36-1.

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*Hon. Jesse E. Eschbach, Senior U. S. Circuit Judge for the Seventh Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2562 and 93-3389

DOROTHY THOMAS,

Plaintiff-Appellant, versus

MONSANTO EMPLOYEE'S CREDIT UNION, MECU,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT and DUBINA, Circuit Judges and ESCHBACH*, Senior

Circuit Judge.

PER CURIAM:

(XX) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc in DENIED

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

* **Hon. Jesse E. Eschback, Senior** U.S. Circuit Judge for the Seventh
Circuit, sitting by designation.